Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: September 30, 1999

GSBCA 13258-COM

ASPEN HELICOPTERS, INC.,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Respondent.

Joseph G. Billings, Landover, MD, counsel for Appellant.

Terry Hart Lee and Amy L. Freeman, Office of General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **DeGRAFF**, and **GOODMAN**.

HYATT, Board Judge.

Appellant, Aspen Helicopters, Inc. (Aspen), seeks to recover costs it incurred in acquiring and modifying a Partenavia aircraft to perform aerial surveys in the Gulf of Mexico under a contract awarded by the Department of Commerce on behalf of the National Oceanic and Atmospheric Administration (NOAA). The contract was for a short base period and three option periods that spanned approximately two years. Aspen performed the base period, but NOAA did not exercise any of the options under the contract. Aspen contends that NOAA should have apprised it of the agency's preference for a Twin Otter aircraft and of the concomitant efforts to obtain a Twin Otter aircraft so that Aspen would have realized that the

probability of the agency exercising the options under this contract would be minimal. For the reasons stated, we conclude that Aspen is not entitled to recover on this basis.

Pursuant to Board Rule 111, this appeal has been submitted for decision on the written record. 48 CFR 6101.111 (1998). The evidentiary record consists of numbered exhibits in the appeal files submitted and supplemented by the parties pursuant to Board Rule 104; the respondent's contract file, with lettered exhibits; deposition transcripts; declarations; responses to written discovery requests; and joint stipulations of fact.[1]

Findings of Fact

The contract at issue originated in connection with a comparative study of cetacean life in deep Gulf of Mexico waters. This study, known as the GULFCET (Gulf of Mexico Cetacean) Program, represented a cooperative research effort conducted by the United States Minerals Management Service (MMS) of the Department of the Interior; the National Marine Fisheries Service (NMFS) and the Southeast Fisheries Science Center (SEFSC) of the Department of Commerce; Texas A&M University; and the Hatfield Marine Science Center of Oregon State University. Joint Stipulation at 2-3; Appeal File, Exhibit 28. The program was initiated to observe cetacean biology in the Gulf of Mexico in order to facilitate efforts to predict the effects of oil and gas development on the marine population in the Gulf. Appeal File, Exhibit 28. The study included aerial surveys of the continental slope in the Gulf of Mexico from Mobile, Alabama to Brownsville, Texas on a seasonal basis. The surveys under the subject contract were to begin in the summer of 1992. Joint Stipulation at 3; Appeal File, Exhibit 28.

In a memorandum dated July 26, 1991, Wayne Hoggard, a biologist with the Southeast Fisheries Center (SEFC)[2] requested that NOAA's Aircraft Operations Center (AOC) provide Twin Otter support for the surveys scheduled to be conducted during fiscal years 1992 and 1993.[3] SEFC further requested that AOC dedicate a Twin Otter

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1 The joint stipulations of fact consist of unnumbered descriptions and definitions, followed by a series of numbered paragraphs from 1 through 82. The numbered paragraphs are cited by number; the unnumbered descriptive stipulations are cited by page number.

2 The Southeast Fisheries Science Center (SEFSC) in Pascagoula, Mississippi, and the Southeast Fisheries Center (SEFC) in Miami, Florida, are both components of the National Marine Fisheries Service (NMFS).

3 AOC was responsible for coordinating requests for aircraft usage from user agencies. The agency would submit a request to the Light Aircraft Coordinator for AOC, who would estimate the cost of using the NOAA aircraft. The coordinator had no authority to approve the use of an aircraft by a requesting agency. Because requests for

aircraft to SEFC for a minimum of two years because of the magnitude of the work and the likelihood that other SEFC projects would also require aircraft support. Joint Stipulation *f* 1. If feasible, SEFC preferred to maintain the same style aircraft for the entire period of the survey. SEFC advised that if an aircraft could not be made available in August 1992, when the GULFCET study was scheduled to commence, then SEFC would have to make other arrangements on its own. Contract File, Exhibit K; Joint Stipulation *f* 8.

In July 1991, when Mr. Hoggard made this request on behalf of SEFC, AOC owned and operated only one Twin Otter aircraft. Joint Stipulation *f* 1. In September 1991, AOC advised SEFC that it would not be feasible to dedicate the Twin Otter aircraft full time to SEFC because of other requests also seeking support from this aircraft. AOC informed SEFC that in light of the numerous requests for the Twin Otter, AOC was looking into acquiring a second Twin Otter aircraft, but cautioned that the acquisition process could be lengthy and that SEFC should not assume it would have a second aircraft available in time to meet all its needs. Joint Stipulation *f* 2. Moreover, even if a second aircraft could be acquired expeditiously, AOC could not guarantee its availability because support for requests was "dependent on project funding and priorities established by NAAC" and "dedication of an aircraft to a single user would have to be allocated by the NAAC." Contract File, Exhibit K.

In November 1991, Mr. Hoggard formally requested aircraft support for the GULFCET project, stating in his request that "long term requirements for aircraft support in the Southeast are extensive." Mr. Hoggard explained that the Twin Otter aircraft, operated by NOAA pilots, was preferred for this project because the aircraft is ideally suited to perform offshore marine surveys, its twin aircraft engines and trackline visibility were essential to completion of the study, and NOAA pilots had extensive experience in flying the aircraft to perform offshore surveys. Contract File, Exhibit K; Joint Stipulation *f* 5.

Subsequently, in January 1992, Mr. Hoggard informed the AOC director that funding for the aerial surveys in fiscal year 1992 had been approved and was available. If AOC was able to support the project, SEFC would transfer the funds to conduct two

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usage, and particularly requests for NOAA's Twin Otter, exceeded the availability of aircraft, the administrative office at AOC would annually prepare a list of requests for aircraft, showing overlapping proposed usage. The list would be forwarded to the NOAA Aircraft Allocation Council (NAAC), which met annually to develop a schedule for usage of aircraft. Once NAAC approved a schedule for assignment of aircraft to requesting agencies, AOC could not change that schedule. AOC could assign an aircraft if the request was for a period of time not covered by the NAAC-approved schedule. Declaration of Michael W. White (White Declaration) (Nov. 12, 1998) *ff* 6-7; Joint Stipulations *ff* 3-4.

surveys during this remainder of fiscal year 1992. Contract File, Exhibit K. The AOC director responded that the Twin Otter was committed to other projects through September 15, 1992, but could be available for assignment to the GULFCET project after that date. In addition, he informed Mr. Hoggard that he was initiating the process to lease or purchase a second Twin Otter aircraft and hoped to have the request to the contracting office by mid-February 1992. Joint Stipulation *f* 8; Contract File, Exhibit K.

In January 1992, having determined that AOC could not meet its needs for a suitable aircraft in time for the project to commence in August 1992, SEFSC decided to charter a private aircraft. Joint Stipulation *f* 23. It issued a requisition for a "twin engine aircraft that provides trackline visibility to conduct surveys of marine life and pollution in coastal waters from Mobile, Alabama to Brownsville, Texas from August 1, 1991 through December 15, 1992." Joint Stipulation at 3. The requisition was provided by SEFSC's purchasing agent, Gayla Fornea, to William Becker, a contracting officer located at the Department of Commerce's Central Administrative Support Center (CASC) in Kansas City, Missouri. The information provided by Ms. Fornea was also reviewed by Naida Green, the CASC contract specialist assigned to the procurement. Joint Stipulations at 4, *f* 19; Deposition Transcript of William Joseph Becker (Becker Transcript) (Sept. 17, 1998) at 11; Deposition Transcript of Naida Alice Green (Green Transcript) (Sept. 16, 1998) at 11.

The solicitation for the charter of a twin engine aircraft (charter services solicitation)[4] was developed between January and May 1992. Joint Stipulations *ff* 20-25, 28-31. The contracting officer recognized that a NOAA-owned aircraft might become available for assignment to the GULFCET program sometime during fiscal year 1993. Joint Stipulation *f* 32. At the same time, the project's importance, and the possibility that a NOAA-owned Twin Otter might not be available prior to December 1992, persuaded SEFC officials that it was important to seek alternative means of achieving the support needed.

Meanwhile, on April 29, 1992, CASC received from AOC a requisition for the lease with option to purchase a high-wing twin turbo-prop aircraft. It was made clear that SEFSC wanted the aircraft acquired under this requisition to be a Twin Otter. Joint Stipulation *f* 16. The requisition led to the development of solicitation number 52WCNA206099.

The second Twin Otter was to be acquired "with the intent that it would serve any mission need that would come out of NOAA and the Department of Commerce." Joint Stipulation *f* 31. More specifically, CASC understood that the second Twin Otter to be acquired under the lease/purchase solicitation would not necessarily be assigned to

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[4] Although the parties describe this procurement as the "lease solicitation," for clarity, we refer to it as the "charter services solicitation." The subsequent procurement of a second Twin Otter is referred to as the lease/purchase solicitation.

support the GULFCET project, even though SEFSC had expressed a strong desire to use it. Green Transcript at 27-28; Becker Transcript at 24-35. Option quantities were included in the solicitation because the charter services were anticipated to be required for at least the base contract period, with a reasonable possibility that services would be required thereafter. Joint Stipulation *f* 31.

The Solicitation to Acquire Charter Services

The *Commerce Business Daily* (CBD) notice synopsizing the requirement for the charter services was published on February 19, 1992. Joint Stipulation *f* 26. The solicitation, a one hundred percent small business set-aside, was issued on April 28, 1992, with an original closing date of May 28, 1992. The acquisition was conducted as a negotiated procurement. Joint Stipulation *f* 29; Contract File, Exhibit B.

In addition to the base performance period, paragraph H.2 of the solicitation, and subsequent contract, stated that the Government had the option to extend the term of the contract for up to three additional periods, with the total contract duration not to exceed two years.[5] In connection with the inclusion of the option periods and quantities in the solicitation, the contracting officer prepared a justification memorandum. Mr. Becker

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[5] Paragraph H.2 of the solicitation and contract, entitled "OPTION TO EXTEND THE TERM OF THE CONTRACT -- FIXED PRICE" stated, in pertinent part:

> (a) Under CLIN [contract line item] 0002-0008, the Government has the option to extend the term of this contract for three (3) additional period(s). If more than thirty (30) days remain in the contract period of performance, the Government, without prior written notification, may exercise this option by issuing a contract modification. To exercise this option within the last thirty (30) days of the period of performance, the Government must provide to the contractor written notification prior to that last thirty (30) - day period. This preliminary notification does not commit the Government to exercising the option. . . .
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> . . . .
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> (d) The total duration of this contract including the exercise of any options under this clause shall not exceed two (2) years.

Contract File, Exhibit P; Appeal File, Exhibit 9; Joint Stipulation *f* 30.

relied on applicable Federal Acquisition Regulation (FAR) requirements in concluding that inclusion of option periods and quantities was justified:

> Federal Acquisition Regulation (FAR) 17.202(d) allows the inclusion of options in the proposed contract when the Government anticipates a need for the services extending beyond an initial contract period and when additional cost may be incurred if services are disrupted.

Contract File, Exhibit H. The following factors persuaded Mr. Becker that inclusion of options was justified: (1) the surveys were time sensitive and had to be performed as scheduled to correlate the data obtained with data generated independently from other sources[6]; (2) it was reasonably certain that funds would be available to perform the surveys during each option period; and (3) CASC could not speculate on the results of the concurrent

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6 In this regard Mr. Becker stated:

> The NMFS mission is to provide information on endangered and threatened species for management decisions. The aerial surveys described . . . are an integral part of "GULFCET," a multi-agency and university endeavor, to examine the seasonal distribution and abundance of cetaceans in the Gulf of Mexico, and the environmental parameters that influence their distribution. The total endeavor encompasses a 2-year period. Because the aerial data collected will be compared to concurrent shipboard surveys, satellite imagery and radio telemetry of sperm whales, it is crucial that the flight surveys be conducted within the same time frame.

Contract File, Exhibit H.

procurement for the lease or purchase of another twin-engine aircraft -- its obligation was to ensure that the requirements could be met. Becker Transcript at 31-32; Joint Stipulation *f* 31.

Mr. Becker further explained that, in light of the knowledge available at the time the solicitation was issued, he recognized that it was possible that a NOAA aircraft could become available to GULFCET during fiscal year 1993, but he could not just assume that a second aircraft could and would be acquired quickly enough to meet the needs of the GULFCET project. He could not be sure that funding would come through for that acquisition, nor could he be certain that an aircraft that was technically acceptable and in suitable condition could be found or that, if found, could be modified to suit the project quickly enough.[7] It was also possible that the NAAC would have determined that another project had a higher priority and assigned the aircraft elsewhere. SEFC did not have the ability to dictate these priorities. Becker Transcript at 24-25, 29-30; Joint Stipulation *ff* 31-32.

A revised CBD notice for the charter solicitation to provide support for the aerial surveys was published on May 11, 1992. Appeal File, Exhibit 34. This notice came to the attention of Aspen, which subscribed to section V of the CBD pertaining to aircraft transportation services. Aspen requested and received a copy of the solicitation. Joint Stipulations *ff* 34-37. Aspen also received modifications to the solicitation. Joint Stipulations *ff* 38-39. The closing date for submission of proposals was June 5, 1992. Aspen submitted its proposal on June 4, 1992. Joint Stipulations *ff* 42-43.

Eight proposals were received in response to the solicitation. The contract specialist forwarded the proposals to Mr. Hoggard, who served as chairman of the source evaluation board, on June 9, 1992. Technical evaluations were completed by June 16, 1992. It was determined that four proposals, including Aspen's, provided the minimum information required by the solicitation. The source evaluation board had questions for the firms which submitted each of these four proposals. Joint Stipulation *f* 45.

In a memorandum dated June 18, 1992, the source evaluation board informed the contracting officer that it had completed evaluations of the cost proposals. Mr. Hoggard requested that the contracting officer check with offerors about reducing the thirty-day start up period provided for in the solicitation because August 1 was "rapidly approaching" and start up "must be on or very near August 1 due to prior personnel commitments." Contract File, Exhibit T; Joint Stipulation *f* 46. On June 24, 1992, Mr. Becker forwarded letters to offerors remaining in the competition, including Aspen,

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[7] Mr. Becker's concerns about the ready availability of a suitable aircraft are supported by statements of the successful offeror under the lease/purchase solicitation. See Appellant's Exhibit 2. These statements are more specifically addressed in the findings of fact applicable to the lease/purchase solicitation below.

seeking clarification of technical issues and costs and stating that the August 1 start up date remained firm due to personnel commitments. Joint Stipulation *f* 47.

In response to Mr. Becker's letter, Aspen clarified its proposal and lowered its pricing, and agreed that it could meet the August 1, 1992 start date if a notice to proceed was issued no later than July 8, giving it three weeks to prepare for performance. Joint Stipulation *f* 48.

On June 26, 1992, the source evaluation board sent a memorandum to Ms. Green, summarizing the eight proposals received and emphasizing the importance of maintaining an August 1 start date. The memorandum recommended the removal of three offerors from the competitive range, leaving, in addition to Aspen, Empire Airlines, Inc., Aero Systems, Inc., Leading Edge Aviation Services, Inc., and Aero-Marine Surveys, Inc. Contract File, Exhibit M; Joint Stipulation *f* 49.

On June 30, the source evaluation board completed its technical evaluations and narrowed the competitive range to three offerors, rated in the following descending order: (1) Aero Systems, Inc., (2) Empire Airlines, Inc., and (3) Aspen Helicopters, Inc. The principal reason for ranking Aspen, which was the low cost offeror, third was a major shortcoming in its proposal -- the Partenavia aircraft proposed by Aspen did not provide the minimum flight time sought in the specifications. The evaluators commented that the competitive price provided by Aspen was likely in part due to the size of the Partenavia aircraft proposed. The technical evaluators advised that Aspen should be considered for the contract only if neither of the other two offerors "were procurable." In evaluating Empire, the evaluators noted the high technical score was not enough to make this offeror competitive absent significant reductions in the proposed price, which was approximately double that of Aspen's. The evaluators regarded the Aero proposal as the best choice in view of its reasonable price and more satisfactory aircraft (a Twin Otter 100 series). Contract File, Exhibits T, V.

On July 6, 1992, the contracting officer issued a competitive range determination for the charter solicitation. Agreeing with the written evaluations submitted by the source evaluation board, he said with respect to Aspen:

> The third choice for consideration is Aspen Helicopters . . . . [T]heir cost proposal is the lowest of all the offerors received. The major weakness noted in Aspen's technical proposal is the flight time capability between refueling of the proposed Partenavia aircraft. The aircraft does not provide the minimum 6.5 hours flight time defined in the specifications. . . . Even considering the reduced price, the Board felt a flight window of only four hours and forty minutes would greatly impact the scope of work as well as add additional costs to

> the Government in terms of having to use the maximum 45-day flight window to accomplish the intended work. The Board recommended that Aspen be considered only in the event that Aero Systems or Empire Airlines are not procurable.

Contract File, Exhibit V.

Aspen's vice-president asserts that on June 19, 1992, he informed Ms. Green that Aspen was entering into a two-year lease of an aircraft specifically for performance of this charter contract and needed to know the status of the procurement and whether the Government intended to exercise the options. Declaration of Richard L. Throckmorton (Throckmorton Declaration) (Aug. 25, 1998) *f* 10. Mr. Throckmorton further avers that in response to his question, Ms. Green said that the work had been ongoing for many years and that the Government customarily exercised options so long as there was money in the budget and the contractor's performance was satisfactory. Id. Ms. Green did not recall having such a conversation with Mr. Throckmorton but said it was possible that she might have made a statement of this nature since historically the agency had exercised options. Green Transcript at 66-67. Mr. Throckmorton also asserts that he again told Ms. Green of Aspen's plan to enter into a two-year lease of the Partenavia aircraft specifically to perform this contract during negotiations conducted on July 14, 1992. According to Mr. Throckmorton, the subject came up because he requested a telefacsimile of the contract to complete financing for the aircraft.[8] Throckmorton Declaration *f* 15. There are no contemporaneous notes of negotiations or telephone conversations provided by the Government, and Aspen's correspondence dated July 14, 1992 does not reflect that Aspen intended, or had told Ms. Green of its intention, to enter into a long-term lease of an aircraft to perform this contract. Contract File, Exhibit BB.

On July 16, 1992, Ms. Green held discussions with Aero Systems concerning its proposal. The principal topic of discussion was the start date of the contract. Later that day, Aero withdrew its proposal in writing, stating that its withdrawal from the procurement was due to the length of time required to make an award. Contract File, Exhibit AA. Subsequently, in a declaration prepared for this appeal, Walter Clement, the president of Aero Systems, explained that Aero Systems received copies of the CBD notices for both the charter services solicitation and the solicitation to lease with option to purchase a Twin Otter aircraft. In reviewing the notices, Mr. Clement thought it was "odd" that NOAA would seek two Twin Otters for overlapping periods of time. This

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[8] According to Aspen's president and vice-president, the Partenavia aircraft was leased principally to perform the NOAA charter services contract, but Aspen anticipated that it would generate additional revenue for the company in flights between survey periods. Declaration of Charles W. McLaughlin (McLaughlin Declaration) (Aug. 25, 1998) *ff* 15, 35; Throckmorton Declaration *ff* 15, 38.

prompted him to pose a question to Naida Green, who was the point of contact for both solicitations. Mr. Clement avers that he asked Ms. Green if the second Twin Otter might be used to replace the Twin Otter to be chartered for the aerial surveys if acquired in time. Ms. Green acknowledged that that could be the case. Based on this, Aero Systems concluded that it was unlikely that NOAA would exercise all, or even some, of the options under the charter services solicitation and that under the circumstances the contract would be unprofitable. Accordingly, Aero decided to withdraw its charter offer. In October 1992, Aero's president, in a telephone conversation with Aspen's president concerning other business matters, related the telephone conversation he had had with Naida Green regarding the two NOAA aircraft solicitations. Declaration of Walter J. Clement (Clement Declaration) (Aug. 24, 1998) *ff* 8-12, 14. Ms. Green did not recall having a conversation with Mr. Clement about the lease/purchase solicitation. Green Transcript at 39.

Discussions with Empire Airlines were held on July 17, 1992. Ms. Green sought a reduction in Empire's proposal price, inquiring whether it would be possible to achieve a reduced price if the requirement for 6.5 hours flight time between refueling were relaxed. Empire replied that the Government could realize a considerable savings if the company could be assured that the options would be exercised. Ms. Green told Empire that the Government could not assure it or any other offeror that the options would be exercised. Contract File, Exhibit AA.

The Government concluded that Empire's offer was too costly to be competitive and selected Aspen for award of the charter contract. Contract File, Exhibit KK, Green Transcript at 46-48. By letter dated July 21, 1992, Ms. Green advised Aspen of the pending contract award. On July 23, 1992, Aspen entered into a two-year lease for the Partenavia aircraft. The charter series contract was sent to Aspen under cover of a letter dated July 29. Aspen executed the contract on July 31, and the contracting officer signed it on August 11. Joint Stipulations *ff* 55, 57, 66, 68. The period of performance for the base survey under the contract was from approximately August 1 to September 14, 1992. The first option period was from approximately November 1 through December 15, 1992. The second option period included four surveys, with approximate dates from February 1 to March 17, 1993; May 1 to June 14, 1993; August 1 to September 14, 1993; and November 1 to December 15, 1993. The third option period covered two surveys, the first from February 1 through March 17, 1994, and the second from May 1 through June 14, 1994. Appeal File, Exhibit 9.

The Solicitation to Lease with Option to Purchase

On May 15, 1992, four days after publication of the revised CBD notice for the charter services solicitation, CASC published a CBD notice for the requirement to lease/ purchase a twin-engine aircraft. The announcement stated that the requirement was for an aircraft to be used primarily for surveying life and pollution in the western central

Atlantic Ocean, Gulf of Mexico, and Caribbean Basin, a somewhat larger geographical area than that covered by the solicitation for charter services. On July 2, 1992, the notice was modified to specify a single make and model -- a Twin Otter 300 series -- and to conduct the procurement on an urgent and compelling basis so as to expedite delivery of the aircraft by September 15, 1992. Appeal File, Exhibits 1, 3; Joint Stipulations *ff* 72-73.

The CBD notice for this solicitation appeared in section W of the CBD. Aspen did not subscribe to this section of the CBD because it is not a lessor or seller of aircraft; Aspen's officers did not see the notices, and they were not aware of this procurement. Additionally, Aspen was not on the procurement source list for the lease/purchase solicitation. Joint Stipulations *ff* 73-74. Finally, Aspen's officers aver that even if they had seen the notice, it would not have been clear to them that it covered the same work included in the lease solicitation for charter services and they would not have realized that NOAA meant to replace the aircraft secured under the charter services contract with the Twin Otter to be acquired under the lease/purchase contract. McLaughlin Declaration *ff* 36-37; Throckmorton Declaration *ff* 39-40.

On June 22, 1992, Mr. Becker, the contracting officer for this procurement as well as the charter services procurement, prepared a memorandum to the file providing a justification to include option periods for the lease/purchase contract and a purchase option in the solicitation. He stated that the aircraft would be used primarily to support the NMFS observation programs, which would include GULFCET, and that the aircraft was needed to mitigate the cost of securing aircraft charter services to support various NMFS observation programs The solicitation for the lease/purchase similarly stated that the aircraft was intended primarily to support NMFS observation programs. Joint Stipulations *ff* 75-76.

On July 8, 1992, the lease/purchase solicitation was issued to some thirty-seven potential sources. Joint Stipulation *f* 77. In its proposal submitted in response to this solicitation, the successful offeror, Federal Airways Corporation, pointed out that the Twin Otter aircraft that NOAA sought to acquire was a scarce commodity. According to Federal Airways, the Twin Otter aircraft was manufactured by DeHavilland Canada. DeHavilland ceased production of this aircraft in 1988, after being acquired by Boeing Aircraft. Although the Twin Otter aircraft enjoys immense popularity, attributable to its low cost of maintenance and large payload capability, there is a serious shortage of the Twin Otter aircraft in supply, there is no competitor aircraft that can take its place, and locating a suitable used aircraft for NOAA was not an easy matter. Appellant's Exhibit 2.

On August 18, 1992, NOAA awarded contract number 50WCNA206099 for lease with option to purchase a Twin Otter aircraft to Federal Airways. Joint Stipulation *f* 79. Federal Airways was required to deliver the aircraft on September 15, 1992. NOAA accepted the aircraft on September 17, 1992. Joint Stipulation *f* 80. The flight logs for

this aircraft, from September 1992 to September 1993, show that SEFSC used the aircraft to conduct the GULFCET Program surveys periodically from November 1992 through September 1993. Joint Stipulation *f* 81.

Performance of the Aspen Contract

Aspen completed the base survey period for GULFCET under its contract with NOAA on September 21, 1992. Joint Stipulation *f* 69. In a letter of that same date, Mr. Hoggard advised Ms. Green not to exercise the first option period with Aspen because a NOAA-owned aircraft would be available to perform the remaining GULFCET surveys covered under the Aspen contract. He stated that he would like Aspen to be informed that the decision not to exercise the first option was not in any way based on poor performance. Supplemental Appeal File, Exhibit 14; Joint Stipulation *f* 70. By letter dated October 6, 1992, Mr. Becker notified Aspen that the first option under its contract would not be exercised. Joint Stipulation *f* 71.

Aspen's Claim

On January 5, 1993, Aspen submitted a Freedom of Information Act request to CASC, seeking, inter alia, documentation pertinent to the lease/purchase acquisition and comparative cost studies for Government versus contractor operation of aircraft. Aspen stated that it intended to submit a request for equitable adjustment under contract 50WCNF206045 and needed the information to support its claim. Appeal File, Exhibit 12. In June 1993, Aspen filed a claim for a constructive change to the contract. After several exchanges of correspondence between Aspen and the contracting officer, Aspen subsequently certified its claim in the amount of $218,759.37. Appeal File, Exhibits 13, 17. The contracting officer denied the claim. Appeal File, Exhibit 19.

Discussion

Aspen argues that it is entitled to recoup the costs it expended in acquiring a two-year lease for the Partenavia aircraft, which it had to modify, to perform contract number 50WCNF206045. Because the Government did not exercise the first option after completion of the short base period of performance, Aspen did not recover its costs. Aspen attributes the losses it claims to have incurred in connection with this contract to respondent's failure to inform it of NOAA's plans (1) to acquire a Twin Otter aircraft under a concurrent lease/purchase solicitation, and (2) to discontinue the exercise of options under the charter services contract once a NOAA-owned Twin Otter aircraft was available to perform the work. In Aspen's view, Commerce had a duty to disclose that the likelihood of exercise of the options would be impacted by the lease/purchase solicitation so that Aspen could make an informed decision whether to compete for the charter services contract. Had it known of the diminished probability of the exercise of the option periods under the charter services contract, Aspen contends, it would not have

offered to perform. Aspen believes the failure to exercise the options under these circumstances should be regarded as a constructive termination of the contract for the convenience of the Government, entitling it to recoup its fixed costs of leasing and modifying the aircraft. Aspen asserts theories of recovery grounded on the doctrines of superior knowledge, the Government's implied duty of communication, and negligent misrepresentation.

The Commerce Department disagrees. It maintains that this was an option contract and, under settled principles of law, the Government's failure to exercise an option is generally not actionable other than in those rare instances in which the decision not to exercise an option is grounded in bad faith, a circumstance which has not been alleged here. Respondent further contends that the theories of recovery relied upon by Aspen are generally not applicable in the context of costs incurred solely by reason of the Government's unilateral exercise of its discretion not to exercise options. Information pertaining to the probability of exercise of an option is not the type of vital information contemplated under the doctrines relied upon by appellant. Finally, although respondent maintains that it had no obligation to disclose its possible plans in connection with the option periods, even if offerors were entitled to be informed of this possibility, NOAA's concurrent procurement of the lease with option to purchase an aircraft suitable to perform these surveys was publicly advertised, putting all offerors of the charter services on constructive notice of NOAA's plan to acquire another Twin Otter which might be preferred for the surveys.

Option Contracts

Under the standard option clause language contained in this contract, the Government, at its discretion, had a broad, unilateral right either to exercise the option periods or not to exercise them. The United States Court of Appeals for the Federal Circuit has explained that the language of this clause is clear and unambiguous and that nothing in this language restricts the Government's bargained-for right to decline to exercise its option to extend the term of the contract. Government Systems Advisors, Inc. v. United States, 847 F.2d 811, 813 (Fed. Cir. 1988); accord Dynamics Corp. of America v. United States, 389 F.2d 424, 431 (Ct. Cl. 1968). The United States Court of Federal Claims and the boards of contract appeals have consistently recognized that option contracts generally bind only the option giver, and not the option holder. The clause does not impose on the Government a legal obligation to exercise the option and require the work; the contractor has no right to the option work unless and until the Government exercises the option. The contractor that prices its proposal by amortizing its fixed costs based on the expectation that option periods will be exercised and awarded by the Government does so at its own risk. E.g., Green Management Corp. v. United States, 42 Fed. Cl. 411, 434 (1998); Continental Collection & Disposal, Inc. v. United States, 29 Fed. Cl. 644, 650 (1993); MManTec, Inc. v. General Services Administration, 99-1 BCA *ƒ* 30,122, at 149,022 (1998); Plum Run, Inc. ASBCA 46091, et al., 97-2 BCA

f 29,193, at 145,231; United Management Inc. v. Department of the Treasury, GSBCA 13452-TD, 96-2 BCA *f* 28,312, at 141,362-63; Pennyrile Plumbing, Inc., ASBCA 44555, et al., 96-1 BCA *f* 28,044, at 140,029; Vehicle Maintenance Services v. General Services Administration, GSBCA 11663, 94-2 BCA *f* 26,893, at 133,879-80; Centennial Leasing v. General Services Administration, GSBCA 11409, 93-2 BCA *f* 25,609, at 127,474-75; Gricoski Detective Agency, GSBCA 8901(7823), et al., 90-3 BCA *f* 23,131, at 116,145.

In Plum Run, the contractor alleged that it had been induced to spread its fixed costs over the entire potential span (base year plus options) of the contract because of representations by an agency official that the contract would be extended through the option periods. The agency did not exercise the options for several reasons, one of which was the decision to perform certain contract functions in-house. Absent proof of bad faith or abuse of discretion, the Government's decision not to exercise an option does not provide a vehicle for relief. As the board observed in Plum Run: "A contractor's decision to price costs over option years creates a risk which is its own." 97-2 BCA at 145,231; see also Pennyrile Plumbing, Inc., 96-1 BCA at 140,029 (denying relief where contractor alleged that it was induced to amortize costs over base year and four option years because agency official described the procurement as a "five-year contract"); Vehicle Maintenance, 94-2 BCA at 133,880 (contractor "assumed any financial risks resulting from its financial planning based on the assumption that it would be awarded all option periods under the contract").

Nothing in the record shows that the inclusion of option periods in this contract was improper based upon the Government's intentions at the time it advertised and negotiated this procurement. The FAR requires only that there be a perceived need for options, and under the facts of record, there was a realistic possibility that some or all of the options might have had to be exercised. The need for inclusion of options existed here because the contracting and program officials were concerned that it would not be possible to perform this project in-house. They recognized that procurement of a second Twin Otter aircraft might not be feasible. This particular aircraft is very popular, was no longer in production at the time of the procurement, and was in very limited supply. The Government could not be sure that it would be able to procure a suitable airplane at all, let alone within a time frame that would meet the requirements of the GULFCET program surveys. The availability of the only Twin Otter aircraft owned by NOAA at the time was also uncertain because of the high level of demand for this aircraft. Although memoranda in the contract files suggest that the plane might have been available for a portion of the GULFCET surveys, it was not promised for the entire period required to complete the surveys as contemplated. NOAA could not readily reschedule the surveys because of the need to coordinate with other sources of data. Thus, there was sufficient likelihood that a need would exist to justify inclusion of options in the solicitation.

Aspen's arguments ignore the fundamental nature of the option feature in this contract and instead focus on various doctrines under which the Government is obligated to disclose information in its possession to prospective contractors. Aspen essentially contends that information affecting the Government's plans to exercise options is the type of information that must be disclosed to enable a potential contractor to properly evaluate whether it should participate in a procurement, and, if so, how to price its offer. As we discuss in more detail below, none of the doctrines relied upon by Aspen to assert the Government's liability for its unrecovered costs apply to the circumstances before us. Indeed, as respondent points out, the cases cited in support of Aspen's contentions do not involve options. Although these doctrines are inapposite for a variety of reasons, the common rationale is that the Government simply is not obliged to disclose information about plans to exercise options because the contract vehicle in and of itself puts the contractor on notice that it should not rely on the exercise of an option. The cases cited above conclusively hold that when the contractor prices its services based on the assumption that options will be exercised the risk is its alone -- if the Government chooses not to exercise the options, and its motivation for this choice is not bad faith, the contractor has no valid basis to complain. The nature of the option clause should have been enough to alert the contractor that there was a possibility the contract would end upon completion of the initial period of performance.

Superior Knowledge

The elements of proof required under the superior knowledge doctrine have been formulated by the United States Court of Appeals for the Federal Circuit as follows:

> A veritable gold mine of circuit case law exists defining the government's duty to disclose superior knowledge on contracts when equitable adjustment claims under contract clauses or breach of contract claims are raised. In either type of claim, the doctrine of superior knowledge requires approximately the same elements to be satisfied. . . . The disclosure of superior knowledge doctrine applies in situations where: (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

Petrochem Services, Inc. v. United States, 837 F.2d 1076, 1078-79 (Fed. Cir. 1988); accord American Shipbuilding Co. v. United States, 654 F.2d 75, 79 (Ct. Cl. 1981); Kelso Painting Co., ASBCA 47639, 99-2 BCA *f* 30,405, at 150,323; LaBelle Industries,

Inc., ASBCA 49307, et al., 98-2 BCA *f* 29,774, at 147,545;. Beckman Construction Co. v. General Services Administration, GSBCA 11796, 93-3 BCA *f* 26,205, at 130,436; Bromley Contracting Co., GSBCA 6965, 85-3 BCA *f* 18,428, at 95,539-40, aff'd 794 F.2d 669 (Fed. Cir. 1986).

In maintaining that the superior knowledge doctrine applies to this situation, Aspen argues that the Government knew there was a concurrent procurement to acquire a Twin Otter aircraft that would very likely be made available to perform these surveys, leading to a severely diminished probability that Aspen would recover its costs across the entire contemplated period of contract performance. In Aspen's view, the Government knew, or should have known, that Aspen was not likely to be aware of the second solicitation and should have shared that information with Aspen, particularly given the nature of questions Aspen claims to have posed to the contract specialist. According to Aspen, the Government's failure to disclose this information to Aspen, so that Aspen could make an informed decision about whether to participate in this procurement, runs afoul of the superior knowledge doctrine.

The superior knowledge doctrine is inapplicable to these circumstances. First, this is not a situation in which Aspen's costs of performance, or ability to perform, were affected by the information that Aspen maintains was withheld.[9] The fact that NOAA was attempting to acquire a second Twin Otter aircraft, and the possibility that, if this

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[9] What constitutes a "vital fact" that the Government is required to disclose is addressed in H.N. Bailey & Associates v. United States, 449 F.2d 376, 382-83 (Ct. Cl. 1971):

> It is clear that [the Government's] duty . . . arose out of its conscious omission to share the superior knowledge which it possessed. In other words, the Government violates its contractual obligations if it permits the contractor to bid for a project and subsequently undertake a course of action in pursuance thereof which the Government knows to be defective, provided that the Government possesses knowledge which is vital to the successful completion of the contract, and provided further that it is unreasonable to expect the contractor to obtain that vital information from any other accessible source. Of course, the corollary of the . . . rule is that the Government is under no duty to volunteer information in its files if the contractor can reasonably be expected to seek and obtain the facts elsewhere, and this court has so held on previous occasions.

(citations omitted) (emphasis added).

attempt succeeded, a Twin Otter might at some point be available to perform some part or all of the optional survey periods under Aspen's contract, are not the types of information required for the contractor to perform under the contract that the doctrine contemplates the Government must disclose. In essence, the superior knowledge doctrine prohibits the Government from withholding special knowledge of novel information that it knows the contractor needs to complete performance and that the contractor would not have reason to know. Florida Engineered Construction Products Corp. v. United States, 41 Fed. Cl. 534, 542-43 (1998) (citing Helene Curtis Industries, Inc. v. United States, 312 F.2d 774 (1963)).

In Florida Engineered Construction, the contractor argued that its default was precipitated by (1) the Government's failure to make progress payments and (2) the Government's failure to inform the contractor of its intent to delay and ultimately reject requests for progress payments. In addressing the latter argument, the court held that an agency's intentions with respect to the making of progress payments is not the type of technical information that is essential to proper performance under the contract as contemplated by Helene Curtis.[10] Aspen's argument is analogous to the argument raised in Florida Engineered Construction and fails for the same reason. Knowledge of the Government's plan to acquire a second Twin Otter was not essential to the ability to perform under the contract awarded to Aspen. Moreover, at the time the award was made to Aspen, NOAA could not have been sure that the lease/purchase solicitation would generate a viable offer to provide an acceptable Twin Otter. In essence, it was proper for the Government to include the options because there was always a possibility, but no guarantee, that options would be exercised in part or even fully. At the same time, the nature of the solicitation itself should have put Aspen on notice that the options might not be exercised. It was not necessary for the Government to be more specific.

Additionally, NOAA did not disclose its knowledge selectively, in violation of the Federal Acquisition Regulation's directive to ensure that offerors compete on a level playing field. 48 CFR 14.208(c) (1992). Aspen strenuously contends that Commerce essentially informed Aero Systems that it would not exercise options under the charter services contract. What the record reveals, at best, however, is Mr. Clement's statement that, upon noticing the second solicitation in the CBD, he telephoned the contract

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[10] In Helene Curtis, the seminal decision enunciating the "superior knowledge" doctrine, the Government did not inform the contractor that a chemical it was required to mix in order to create a disinfectant powder had to be ground prior to mixing. The contractor did not grind the chemical; its failure to do so led to an inability to meet contract requirements, which in turn caused the Government to terminate the contract for default. The Court of Claims found that the Government, which had sponsored original research on the disinfectant, knew the chemical had to be ground, realized that the contractor did not plan to grind the chemical, was in a better position to know what was required, and was thus obligated to pass this information along to the contractor.

specialist and inquired whether the procurement of this Twin Otter could impact the exercise of options under the charter services contract. He states that she said yes, and he inquired no further. Nothing in the record establishes that he told Ms. Green that this was the basis for his decision to withdraw from the competition. The contemporaneous documentation shows that the stated reason for Aero's withdrawal was the length of time required for negotiations. Nothing establishes that Ms. Green knew or should have known that Aero had amortized its costs across a two-year period and was withdrawing from the competition because it had realized that the options might not be fully exercised. Moreover, the record does not establish that respondent knew or should have known that Aspen had amortized its costs over the option periods.[11] From the Government's perspective, the fact that the options gave it unilateral discretion to order additional services if it wanted or needed to, should have been enough to apprise offerors of the risks inherent in pricing an offer. Ms. Green told Mr. Clement no more than this. In any event, as already stated, the information that Aspen maintains was withheld is not the type of information the Government is required to disclose under the superior knowledge theory (or for that matter under the other disclosure theories argued by appellant).

In addition, the record does not establish that the Government knew or had reason to know that Aspen was unaware of the second procurement or that it would have no reason to learn of the parallel procurement. The plan to procure another Twin Otter aircraft that would be primarily made available to support NMFS was not intentionally concealed from prospective bidders on the charter services solicitation. It was publicly announced in the CBD, which puts contractors on constructive notice of the Government's plans. This is not an instance of special knowledge available only to the Government. Indeed, Mr. Clement's declaration establishes that at least one bidder presumably did take note of the second procurement and recognize the possibility that exercise of options under the subject contract might be affected.

Duty to Communicate

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[11] There is no contemporaneous documentation showing that the Government understood or gathered that Aspen's pricing was based on an expectation that the options would be exercised. Although Aspen's price was low, the Government thought that was at least in part attributable to the less desirable aircraft Aspen offered. Contract File, Exhibit T. Although Aspen now says it asked the contract specialist about the likelihood of options being exercised, neither it nor the Government memorialized this discussion at the time. The declaration filed by Aspen states simply that a question was asked and that Ms. Green replied that historically options had been exercised. In any event, this does not amount to a guarantee or commitment that options will be exercised for the subject contract. Gricoski Detective Agency, 90-3 BCA at 116,145.

Although appellant treats the "implied duty to communicate" as a separate theory of recovery, the duty to communicate is simply another way to describe the Government's obligation to volunteer information that is essential to the contractor's performance efforts, a concept closely akin to the superior knowledge doctrine discussed above. Aspen relies heavily on this Board's decision in Automated Services, Inc., GSBCA EEOC-2, et al., 81-2 BCA *ƒ* 15,303. This case, too, is distinguishable from Aspen's situation. In Automated, the contractor planned to use its own programming system to carry out statistical surveys of employer compliance with the provisions of civil rights laws. At the time that proposals were evaluated, the technical evaluation committee recognized that the contractor's proposed system would require extensive modifications to perform the agency's survey requirements. In fact, it was clear to the evaluators that the program intended to be used by the contractor would create unmanageable problems in data collection absent changes substantial enough to virtually alter the identity of the program altogether. Although the evaluators realized this, they never communicated any concerns to the offeror, which ultimately was awarded the contract. The Board held that the agency breached its duty to communicate such information to the contractor, since the agency was in the best position to alert the contractor to the significant, potential expenses it would encounter in attempting to perform.[12]

Again, the facts here, viewed in the context of the legal principle relied upon by Aspen, fail to support appellant's position. In Automated, the Government had in its possession unique information relevant to performance of technical contractual requirements or to the cost of performing under the contract. The contractor in Automated encountered unexpected costs and hindrances in performance that it could have accounted for in its proposal had the Government been forthcoming. Aspen's actual costs of performance were not impacted -- what Aspen complains about is that it took the risk of amortizing its costs over the option periods and the options were not exercised. Unlike the situation in Automated, the risk undertaken by Aspen was clear under the terms of the solicitation. The duty to communicate does not arise in these circumstances. See ECOS Management Criteria, Inc., VABCA 2058, 86-2 BCA *ƒ* 18,885, at 95,259.

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[12] As respondent points out, the following observation in Judge Hendley's separate opinion in Automated is more appropriate here:

> [B]arring Government knowledge, actual or constructive, of an offeror's mistake which can be reasonably expected to impact performance significantly, it is reasonable for the Government to assume that a contractor is the best judge of its own competency and will exercise good judgment in deciding to make a bid or offer on a proposed contract.

81-2 BCA at 75,778.

Misrepresentation

Alternatively, Aspen contends that it should recover under a negligent misrepresentation theory. In pressing this theory, appellant refers us to the following passage, summarizing the rules to be derived from case law in which contractors had alleged increased costs of performance under one contract were caused by actions taken under other contracts, from General Dynamics Corp. v. United States, 585 F.2d 457, 466 (Ct. Cl. 1978):

> The cases seem to lead to the conclusion that only in exceptional circumstances can an equitable adjustment be made for extra cost in performing one contract, caused by the government doing things it had a right to do, respecting other contracts. Such rare cases will be those of concealment from the plaintiff, when it bids, of already formulated plans and intentions respecting other contracts, which plans and intentions plaintiff needs to know to estimate its costs, possibly some instances of intentionally and knowingly hindering the plaintiff in doing contract work, and perhaps other instances where some degree of government culpability and 'proximate cause' exist.

Aspen argues that by failing to disclose its "already formulated plans" concerning the exercise of options, Commerce effectively induced it to enter into a loss situation with respect to the charter services contract. In T. Brown Constructors, Inc. v. Pena, 132 F.3d 724, 729 (Fed. Cir. 1997), the Court explained that to recover under a theory of misrepresentation the "contractor must show that the Government made an erroneous representation of a material fact that the contractor honestly and reasonably relied on to the contractor's detriment." Accord McDonnell Douglas Corp., ASBCA 46266, 99-1 BCA *f* 30,152 (1998). Appellant relies on the Board's decision in Active Fire Sprinkler Corp., GSBCA 5461, 85-1 BCA *f* 17,868 (1984), to establish its proposition that failure to disclose can be treated as an affirmative misrepresentation under the proper circumstances. There the Board held that if the Government has either affirmatively misrepresented, or failed to disclose, pertinent information, the contractor may recover if it shows that "it was misled under circumstances that indicate it would be unfair to hold it to what would otherwise be its contractual obligation." Id. at 89,480.

Aspen's attempt to fit its situation under a negligent misrepresentation theory fails for reasons similar to those discussed above in connection with superior knowledge and the duty to communicate. Again, the "failure" to disclose information concerning potential plans with respect to the exercise of options was not related to the cost of performance and was not a factor that can reasonably be said to have "induced" appellant to seek this contract or agree to perform it under unfavorable terms. Although appellant

states that it would have priced the contract differently, or not bid at all, had it known the Government was seeking to acquire another Twin Otter and, if successful, might not exercise the options, this argument does not withstand analysis. The Government is not required to disclose every remnant of information in its possession that might be of use to a prospective contractor in deciding whether to compete and how to price its offer. The solicitation made it clear that the Government was under no obligation to award work to the contractor beyond the base period surveys. The terms of the solicitation were sufficient to alert interested offerors to the fact that the contract might not extend beyond the base period. Aspen made a business decision to amortize the costs of acquiring a suitable aircraft over a two-year period. The Government did not impermissibly induce it to take this risk. If Aspen relied on the existence of the option periods in the solicitation, and the agency's history of exercising those options in the past, to assume that the options would be exercised automatically if money was available, its reliance was not reasonable.

To conclude, Aspen has not shown that the Government misrepresented, either affirmatively or by concealment, any facts that were necessary to enable it to perform this contract. Aspen is not entitled to recover under this theory.

Conclusion

Aspen, in summarizing its position, maintains that regardless of the theory adopted to demonstrate entitlement, the crux of its case is that it is entitled to recover because the Commerce Department failed to disclose to Aspen that there was almost no possibility that the option periods under the subject contract would be exercised.[13] This was "vital information" that Aspen needed to properly price its proposal. Had NOAA informed Aspen that the Partenavia aircraft would be replaced by a Twin Otter as soon as one became available, and that the agency was actively seeking to acquire another Twin Otter aircraft which in all likelihood would be assigned to the GULFCET project, Aspen could have protected itself by either withdrawing from the competition or repricing its proposal to ensure recovery of fixed costs in the base period of performance. Aspen does not contend that the Government's decision not to exercise the options was grounded in bad faith or an abuse of discretion, nor does Aspen argue that the Government was obligated to exercise the options.

In making its arguments, Aspen overlooks the fact that under settled principles governing option contracts, the contractor that amortizes fixed costs over a period that

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[13] Aspen also argues that the Government's failure to inform it of the risk that options would not be exercised if a Twin Otter became available was particularly objectionable given appellant's status as a small business. Regardless of its small business status, Aspen's interpretation of contract documents is still measured against the same "reasonable and prudent contractor" standard applied to larger business concerns. H.B. Mac, Inc. v. United States, 153 F.3d 1338, 1345 (Fed. Cir. 1998).

includes option years assumes the risk that these costs will not be recovered if the Government, for some reason, does not exercise the options. Regardless of whether the likelihood of obtaining a substitute aircraft for option periods was remote or reasonably certain, the Government was not obligated to disclose to Aspen that it might not exercise the options. This is obvious on the face of the solicitation and the risk that options might not be exercised is inherent in the terms of the contract. This risk is unequivocally assigned to the contractor and is akin to the risk, under an indefinite delivery indefinite quantity (IDIQ) contract, that quantities above the guaranteed minimum might not be ordered. In addressing this risk, the Court of Claims has stated:

> The key consideration here is the allocation of risk under the contract. . . . The general rule is clear: a contractor cannot sign a contract which allocates the risk to it and then . . . come to this court, having lost its gamble, and insist that the risk be placed on the Government.

Dot Systems, Inc. v. United States, 231 Ct. Cl. 765, 768 (1982). The prudent contractor understands this risk and prices its proposal accordingly.

Decision

The appeal is **DENIED**.

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CATHERINE B. HYATT
Board Judge

We concur:

_____ _____
MARTHA H. DeGRAFF ALLAN H. GOODMAN
Board Judge Board Judge